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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE HONORABLE MIKE J. FOSTER, JR., GOVERNOR; THE LOUISIANA STATE BOARD OF ETHICS, AND ITS MEMBERS; ROBERT ROLAND, HARRY BLUMENTHAL, JR., ROBERT BAREIKIS, Dr., E.L. GUIDRY, VIRGIL ORR, Dr., REVIUS ORTIQUE, JR., T.O. PERRY, JR., ROBERT L. SAWYER, NATHAN J. THORNTON, JR., EDWIN O. WARE, III, CAROLE COTTON WINN; DAVID W. HOOD, SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS; AND MARK C. DRENNEN, COMMISSIONER OF ADMINISTRATION,

Petitioners,

versus

PHILLIP E. O'NEILL, AVERY C. ALEXANDER, AND ARTHUR A. MORRELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Fifth Circuit err when it affirmed the finding of the United States District Court for the Eastern District of Louisiana that Louisiana's program for the random drug testing of its elected officials set out in LSA-R.S. 42:1116.1 and Chapter 17 of the Rules for the Louisiana Board of Ethics does not comport with the requirements of the Fourth Amendment to the United States Constitution?

2. Did the United States Court of Appeals for the Fifth Circuit err by failing to find that Louisiana has "special needs, beyond the normal need for law enforcement," allowing for the random drug testing of its elected officials pursuant to LSA-R.S. 42:1116.1 and Chapter 17 of the Rules for the Louisiana Board of Ethics?

3. Did the United States Court of Appeals for the Fifth Circuit err by failing to find that Louisiana's program for the random drug testing of its elected officials set out in LSA-R.S. 42:1116.1 and Chapter 17 of the Rules for the Louisiana Board of Ethics is distinguishable from Georgia's drug testing program which was at issue in *Chandler v. Miller*, 520 U.S. 305 (1997)?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding.

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CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered in this matter on December 28, 1999, Docket No. 98-31415, ___ F.3d ___.

The decision of the United States District Court for the Eastern District of Louisiana, Docket Nos. 98-2807 and 98-2870, Section L, was entered in November of 1998, 61 F.Supp.2d (E.D. La. 1998).

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Fifth Circuit in this matter on December 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The full text of Louisiana Revised Statutes 42:1116.1, Louisiana's Drug Testing Statute, is contained in Appendix 3.

2. The full text of Chapter 17 of the Rules for the Louisiana Board of Ethics relative to the drug testing of Louisiana's elected officials is contained in Appendix 4.

3. Fourth Amendment to the United States Constitution:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

In 1997, the Louisiana Legislature enacted a program for the random drug testing of Louisiana's elected officials in order to ensure that such officials "are persons of integrity, sound judgment, reliability, and seriousness of purpose . . . " and to promote the physical and mental well being of such officials so they can continue to function effectively in all aspects of their duties.[1] In November of 1998, the United States District Court for the Eastern District of Louisiana found Louisiana's random drug testing program violative of the Fourth Amendment

[1] LSA-R.S. 42:1116.1A, *see* Appendix 3.

to the United States Constitution and issued a permanent injunction preventing its enforcement.[2]

The crux of the District Court's opinion was that no meaningful distinction existed between the present case and this Court's opinion in *Chandler v. Miller*[3] whereby this Court struck down as unconstitutional Georgia's drug testing of candidates. However, there is a vast difference between Louisiana's elected officials and those who merely seek election to public office: **candidates** are private citizens. **Elected officials** are decidedly different from citizen-candidates. Louisiana's elected officials have a significantly diminished expectation of privacy thereby enhancing Louisiana's "special needs" to randomly drug test such officials. Further, the use of judgment impairing illegal drugs by Louisiana's elected officials poses a real and concrete danger as such officials are entrusted with the management of government and with governmental decision making authority.

Accordingly, it is essential to the State's compelling interest in regulating certain untoward activities of its elected officials that this Court review the decision of the United States Court of Appeals for the Fifth Circuit which summarily upheld and adopted the reasons enunciated by the District Court.[4]

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[2] *See* Appendix 2.

[3] 520 U.S. 305 (1997).

[4] *See* Appendix 1.

STATEMENT OF THE CASE

By virtue of Acts 1997, No. 1303, the Louisiana Legislature enacted a program which provided for the random drug testing of all elected officials throughout the State of Louisiana, except for judges.[5] Through such legislation, the Louisiana Board of Ethics was given the responsibility to develop and administer the drug testing program and to adopt rules and regulations necessary for the implementation of the random drug testing program.[6] Pursuant to this responsibility, the Board adopted and promulgated rules to implement the drug testing program.[7]

Subsequently, two complaints were filed in the United States District Court for the Eastern District of Louisiana which alleged that Louisiana's drug testing program was violative of the United States Constitution and the Constitution of Louisiana. A hearing was held on

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[5] Acts 1997, No. 1303 was enacted as an addition to the Code of Governmental Ethics (LSA-R.S. 42:1101 et seq.) and is found in LSA-R.S. 42:1116.1. (*See* Appendix 3.) Section 1167 of the Code of Governmental Ethics (LSA-R.S. 42:1167) clearly exempts judges from the provisions of the Code of Governmental Ethics and provides as follows:

> All judges, as defined by the Code of Judicial Conduct, shall be governed exclusively by the provisions of the Code of Judicial Conduct, which shall be administered by the Judiciary Commission provided for in Article V, Section 25 of the Louisiana Constitution.

[6] LSA-R.S. 42:1116.1B, *see* Appendix 3.

[7] *See* Appendix 4.

the complaints and the Honorable Eldon E. Fallon, Presiding Judge, found that Louisiana's drug testing program was violative of the Fourth Amendment to the United States Constitution and issued a permanent injunction preventing the enforcement of the program.

Thereafter, the Governor of Louisiana, the Louisiana Board of Ethics and its members, the Secretary of the Louisiana Department of Health and Hospitals, and the Commissioner of Administration for Louisiana timely filed an appeal from the District Court judgment with the United States Court of Appeals for the Fifth Circuit. District Court jurisdiction was appropriate pursuant to 28 U.S.C. § 1331. Appellate jurisdiction was appropriate pursuant to 28 U.S.C. § 1291 and § 1292(a)(1).

ARGUMENT

I. Overview of Louisiana's Drug Testing Program

The Louisiana Legislature adopted the random drug testing program for elected officials to further the compelling governmental need of ensuring that elected officials in Louisiana "are persons of integrity, sound judgment, reliability, and seriousness of purpose . . . " and to promote the physical and mental well being of elected officials in Louisiana so such officials continue to function effectively in all aspects of their duties.[8] Pursuant to its statutory responsibility, the Board promulgated rules to implement the program.[9]

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[8] LSA-R.S. 42:1116.1A, *see* Appendix 3.

[9] *See* Appendix 4.

The program requires elected officials, on a random basis, to submit to a drug test to screen for the presence of the following illegal drugs which are not taken pursuant to a lawful prescription: marijuana, opioids, cocaine, amphetamines, and phencyclidine.[10] The Board determines the percentage of elected officials to be tested each fiscal year within established guidelines.[11] Each elected official is assigned a number by the Board's designated representative to ensure that the selection process and the test results are kept confidential.[12] The designated representative then supplies the numbers to the random number selector who selects at random the elected officials to be tested, according to the percentage established by the Board.[13] The random number selector does not, at any time, have access to the names of the elected officials.[14]

Once the elected officials to be tested are selected, notice is delivered by a commercial delivery service to each elected official ordering the elected official to report to a designated collection site within 32 hours from receipt of such notice to submit a urine sample to be

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[10] LSA-R.S. 42:1116.1B(1), *see* Appendix 3.

[11] Rule 1709 of the Rules for the Board of Ethics, *see* Appendix 4, p. 44.

[12] Rule 1705 of the Rules for the Board of Ethics, *see* Appendix 4, p. 43.

[13] Rule 1707 of the Rules for the Board of Ethics, *see* Appendix 4, p. 43.

[14] *Id.*

tested for the presence of illegal drugs.[15] If the elected official does not receive notice, the Board's designated representative issues a subpoena to be personally served on the elected official which orders the elected official to report to a designated collection site within 32 hours of service of the subpoena.[16] Throughout the process, the Board's designated representative has the duty to ensure the confidentiality of all procedures associated with the testing of the elected official.[17] If the elected official cannot report to the collection site within 32 hours, the elected official has the opportunity to establish good cause for such failure to report.[18]

Once the specimen is collected, an approved laboratory will test the specimen for the presence of the enumerated illegal drugs.[19] If the results of the initial test are positive, the results are disclosed only to the elected official and the Board's designated representative.[20] Then, the laboratory must conduct a confirmatory test.[21]

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[15] Rules 1701 and 1710 of the Rules for the Board of Ethics, *see* Appendix 4, pp. 41 and 44.

[16] Rule 1710 of the Rules for the Board of Ethics, *see* Appendix 4, p. 44.

[17] Rule 1703E of the Rules for the Board of Ethics, *see* Appendix 4, p. 42. *See also* LSA-R.S. 42:1116.1D(1) contained in Appendix 3.

[18] Rule 1721 of the Rules for the Board of Ethics, *see* Appendix 4, p. 49.

[19] LSA-R.S. 42:1116.1C, *see* Appendix 3.

[20] LSA-R.S. 42:1116.1D(2), *see* Appendix 3.

[21] LSA-R.S. 42:1116.1B(2) and Rule 1715C of the Rules for the Board of Ethics, *see* Appendix 3 and Appendix 4, p. 47.

If the confirmatory test is also positive, then the information may be privately released to the Board.[22] The tested elected official is not prohibited from disclosing the results of his drug test to any person he chooses.[23]

If the initial and confirmatory tests are positive, then the Board may conduct a private hearing to determine if the elected official violated LSA-R.S. 42:1116.1.[24] If the Board finds that the elected official violated LSA-R.S. 42:1116.1, no penalty may be imposed.[25] However, the Board will issue a subpoena to the elected official ordering his appearance at a collection site to submit to a second drug screening not less than one month and not more than six months after the finding of such violation.[26] Only if the second drug test and confirmatory tests are positive can the Board hold a public hearing and impose civil penalties.[27]

II. Louisiana's Drug Testing Program is Constitutional

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Eastern District of Louisiana which found

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[22] LSA-R.S. 42:1116.1D(2), *see* Appendix 3.

[23] LSA-R.S. 42:1116.1D(4), *see* Appendix 3.

[24] Rule 1727A of the Rules for the Board of Ethics, *see* Appendix 4, p. 52.

[25] LSA-R.S. 42:1116.1E, *see* Appendix 3.

[26] Rule 1717A of the Rules for the Board of Ethics, *see* Appendix 4, p. 48.

[27] LSA-R.S. 42:1116.1E and Rule 1727B of the Rules for the Board of Ethics, *see* Appendix 3 and Appendix 4, p. 52.

Louisiana's drug testing program violative of the Fourth Amendment of the United States Constitution and issued a permanent injunction preventing the enforcement of the program. However, the Appellate Court erred as Louisiana demonstrated "special needs, beyond the normal need for law enforcement," which form the basis for its drug testing program.

The Fourth Amendment of the U.S. Constitution requires the government to respect "the right of the people to be secure in their persons . . . against **unreasonable** searches and seizures." (Emphasis added.) As it is not disputed that Louisiana's drug testing requirement is a search for purposes of the Fourth Amendment, the issue presented in this case is whether the search is "reasonable." Ordinarily, a search is reasonable pursuant to the Fourth Amendment if it is based on individualized suspicion of wrongdoing.[28] However, this Court has consistently held that exceptions to the rule of individualized suspicion are warranted based on "special needs, beyond the normal need for law enforcement."[29] When such special needs are alleged, the courts must examine the competing private and public interests advanced by the parties.[30] In other words, "where the privacy interests implicated by the search are minimal, and where an

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[28] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

[29] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 619 (1989).

[30] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[31]

The special needs of Louisiana in drug testing its elected officials are reflected in the drug testing statute itself. LSA-R.S. 42:1116.1A provides as follows:

> The legislature declares the interest of the state in ensuring that those who are elected to serve in public office at all levels of government are **persons who have a respect for the laws they are to uphold and are persons of integrity, sound judgment, reliability, and seriousness of purpose**. The legislature finds that the **use of illegal drugs which may impair the physical or mental ability of an elected official to function effectively in all aspects of his duties cannot be tolerated**, and therefore the state has a compelling interest in establishing a requirement that all elected officials demonstrate that they do not use illegal drugs, without the necessity of showing any measure of individualized suspicion. (Emphasis added.)

The citizens of Louisiana have entrusted their elected officials with the fiscal well being of the State. In addition, Louisiana's elected officials are charged with enacting and enforcing Louisiana's anti-drug laws and policies. In fact, Louisiana's elected officials are required to take an oath of office in which they swear to "support the constitution and laws of the United States and the

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[31] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 624 (1989).

constitution and laws of" Louisiana and to "faithfully and impartially discharge and perform all the duties incumbent" upon them as elected officials.[32] There is a real and concrete danger that the use of illegal drugs by elected officials in Louisiana will impair the judgment and integrity of those elected officials, will jeopardize the discharge of public functions, including the enactment and enforcement of state anti-drug laws and policies, and will undermine the public confidence and trust in Louisiana's elected officials.

While there has been no showing of a history of drug abuse by Louisiana's elected officials, such a showing is not a necessary element to prove that a "special need" is present in this case. In fact, such a showing "is not mandatory and such a requirement would present 'an unduly narrow view of the context in which' " Louisiana's drug testing program was implemented.[33] " 'Drug abuse is one of the most serious problems confronting our society today' " and "neither our workplaces nor our elementary schools are immune from the drug scourge causing such problems in our land."[34]

Louisiana is no exception. In Louisiana's war on drugs, its elected officials are one of its first lines of defense to prevent the influx of drugs into Louisiana and to prevent the use of drugs by its citizens. In fact,

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[32] Louisiana Constitution Article X, Section 30, *see* Appendix 5, p. 54.

[33] *Aubrey v. Lafayette Parish*, 148 F.3d 559, 563 (5th Cir. 1998) citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

[34] *Id.*

"[e]lected state officials control not merely what will happen to a particular package of drugs, but the flow of all narcotics into the state."[35] Further, "[s]tate politicians' positions of power can also make them vulnerable. The bribery and blackmail targeted at a Customs Service agent pales in comparison to that directed at policy making officials."[36] Louisiana's elected officials enact and enforce Louisiana's anti-drug laws and must be beyond reproach when it comes to such activities.

In a recent opinion rendered by the United States Court of Appeals for the Seventh Circuit, *Todd v. Rush County Schools*,[37] the Seventh Circuit upheld as constitutional a drug testing program instituted by the Rush County School Board which required any high school student wishing to participate in extracurricular activities to consent to a random urine test for drugs, alcohol, and tobacco. The Court found that the program at issue furthered a special need of the government beyond that of law enforcement since the program "was designed to deter drug use and not to catch and punish users."[38] Additionally, the Court stated that "successful extracurricular activities require healthy students."[39] Finally, the

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[35] George M. Dery, III, *Are Politicians more Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 Ariz. L. R. 73, 93 (1998).

[36] *Id.* at 93-94.

[37] 133 F.3d 984 (7th Cir. 1998).

[38] *Id.* at 986.

[39] *Id.*

Court went on to find that the drug testing scheme was reasonable stating that:

> [E]xtracurricular activities, like athletics, "are a privilege at the High School." . . . [T]he drug testing program applies only to students who have voluntarily chosen to participate in an activity. . . . [S]tudents in other extracurricular activities, like athletes, "can take a leadership role in the school community and serve as an example to others . . . . Participation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community" and thus "it is not unreasonable to couple these benefits with an obligation to undergo drug testing."[40] (Citations omitted.)

The governmental interests, or "special needs", presented by the Louisiana drug testing program are similar to those presented in the *Todd* case. First, the Louisiana program serves an interest beyond law enforcement as the law is designed to deter drug use rather than to punish users. Pursuant to LSA-R.S. 42:1116.1D(1), "[a]ll information, interviews, reports, statements, memoranda, or test results received by the board through its drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in a proceeding, hearing or civil litigation for a violation of this Section." The results of a positive initial test can be disclosed only to the elected official and to the Board's designated representative.[41] The information may

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[40] *Id.*

[41] LSA-R.S. 42:1116.1D(2), *see* Appendix 3.

be disclosed to the Board only if the confirmatory test is also positive.[42] Further, a public enforcement proceeding to impose civil penalties cannot be conducted unless the elected official has tested positive for illegal drugs on two separate occasions.[43] Consequently, if an elected official tests positive for illegal drugs, that information is kept confidential. In fact, the Board will not find out that the elected official tested positive unless the confirmatory test is also positive for illicit drugs. Even if the initial and confirmatory tests are both positive, that information is not released to anyone other than the elected official tested, the Board, and the Board's designated representative. However, the tested elected official is not prohibited from disclosing the results of his drug test to any person he chooses.[44] Even if an elected official tests positive on the initial and confirmatory tests, the elected official is not subject to civil penalties. Therefore, the elected official has the opportunity to discontinue any illegal drug use, seek professional help, and/or resign his elected position before any further actions are taken. It is only after testing positive for a second time that the elected official may be subject to a public hearing and the imposition of civil penalties by the Board. Accordingly, it is clear that Louisiana's drug testing program serves interests beyond that of law enforcement in that the program is designed to deter drug use among Louisiana's elected officials and is **not** designed to punish elected officials for using illegal drugs.

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[42] LSA-R.S. 42:1116.1D(2), *see* Appendix 3.

[43] LSA-R.S. 42:1116.1E, *see* Appendix 3.

[44] LSA-R.S. 42:1116.1D(4), *see* Appendix 3.

Second, Louisiana has a compelling interest in ensuring that its elected officials are healthy. Louisiana's elected officials are charged with maintaining the State's fiscal well being as well as being charged with safeguarding the health and welfare of the citizens of Louisiana. Additionally, Louisiana's elected officials must establish and enforce Louisiana's anti-drug laws. Discharging these responsibilities requires sound judgment and integrity. Without elected officials of sound mental and physical health, the welfare of the State of Louisiana and its citizens is put in serious jeopardy.

Third, holding an elective office is a privilege in which the particular individuals elected have voluntarily chosen to participate. While participation in the democratic process, such as **seeking** elective office, is a right vested in every citizen of the United States, an elected official does not have the right to retain such an elective office.[45] The retention of an elective office is a privilege which may be maintained only if the official continues to exhibit the qualities of good moral character, sound judgment, integrity, and fitness for office. An elected official in Louisiana may be impeached for committing or being convicted of a felony or for malfeasance or gross misconduct while in public office.[46] Further, pursuant to the

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[45] *See* Case Comment, *Fourth Amendment – Mandatory Drug Testing – Eleventh Circuit Upholds Suspicionless Drug Testing for Political Candidates. – Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3086 (U.S. Oct. 1, 1996) (No. 96-126), 110 Harv. L. Rev. 547, 551-552 (1997).

[46] Louisiana Constitution Article X, Section 24, *see* Appendix 5, p. 54.

authority contained in Article X, Section 26 of the Louisiana Constitution, the Louisiana Legislature enacted laws providing for the recall of elected officials by the Louisiana electorate.[47]

Finally, elected officials should take a leadership role in the community and often serve as an example to the community. There is no greater role of leadership than that of holding elective office. One of the leadership roles exercised by elected officials, at both the state and local level, has been the imposition of drug testing programs. City Council members in a number of municipalities have required drug testing of city employees. School boards have required drug testing of school system officials and students. Statewide office holders have required employees in their departments to participate in drug testing programs. And, the legislature has imposed various drug testing programs, including the one which has been challenged in this case.

As Louisiana has "special needs" beyond law enforcement to conduct random drug testing of its elected officials, the privacy interests of Louisiana's elected officials must be weighed against Louisiana's interest in suspicionless drug testing. Louisiana's elected officials have a diminished expectation of privacy by reason of their voluntary participation in an activity which is pervasively regulated and carries with it enhanced prestige. In addition, it is not feasible for Louisiana to conduct drug testing based on individualized suspicion as the State cannot monitor the day-to-day

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[47] LSA-R.S. 18:1300.1 et seq., *see* Appendix 5, pp. 55-68.

activities required to elicit such suspicion. Accordingly, Louisiana's interests in conducting suspicionless drug testing of its elected officials are compelling and outweigh the diminished expectations of privacy held by such elected officials.

This Court recognized in *Skinner v. Railway Labor Executives Association*[48] that an individual's expectation of privacy is diminished by reason of his participation in an activity that is pervasively regulated. As Louisiana's elected officials have voluntarily chosen to participate in an activity which is pervasively regulated, they have a diminished expectation of privacy.

Louisiana's elected officials give up many rights held by other individuals in the private sector. While campaigning, candidates are required to disclose any contributions received or expenditures made pursuant to Louisiana's Campaign Finance Disclosure Act.[49] The reports filed are subject to audit and failure to report or failure to accurately report can subject the candidate to civil penalties.[50]

Elected officials, unlike candidates, also submit to additional forms of scrutiny with respect to their financial condition. LSA-R.S. 42:282 requires public officers to account not only for monies received by them on behalf of the State but also for fees received for services rendered.[51] Failure to comply with this provision can subject

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[48] 489 U.S. 602, 627 (1989).

[49] LSA-R.S. 18:1481 et seq., *see* Appendix 5, pp. 69-176.

[50] LSA-R.S. 18:1505.1 et seq., *see* Appendix 5, pp. 133-159.

[51] *See* Appendix 5, p. 227.

the official to fines or imprisonment. In addition, the papers, books, accounts, records, files, etc. of the offices and programs of each elected official are subject to audit by the legislative auditor.[52] Moreover, LSA-R.S. 42:1114 requires financial disclosure of certain types of private income.[53]

Further, upon becoming an elected official, the conflicts of interest provisions contained in the Code of Governmental Ethics are applicable.[54] An elected official is prohibited from working for or receiving gifts from any person who has a contractual, business, or financial relationship with his public agency.[55] In addition, an elected official and any legal entity in which he owns over twenty-five percent cannot enter into contracts, subcontracts or any other transactions with his public agency.[56] There are also restrictions with respect to post-employment activities of elected officials.[57] Therefore, by becoming an elected official, an individual voluntarily subjects himself to restrictions with respect to whom he may or may not do business with or receive gifts from while in public office and further restricts himself with respect to activities upon termination of his public service.

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[52] *See* LSA-R.S. 24:511 et seq., *see* Appendix 5, pp. 177-216.

[53] *See* Appendix 5, pp. 245-249.

[54] *See* LSA-R.S. 42:1101 et seq., *see* Appendix 5, pp. 228-315.

[55] LSA-R.S. 42:1111C(2) and 1115A, *see* Appendix 5, pp. 238-240 and 249.

[56] LSA-R.S. 42:1113A, *see* Appendix 5, p. 243.

[57] LSA-R.S. 42:1121A, *see* Appendix 5, p. 260.

Another restriction applicable to elected officials is the prohibition against dual officeholding.[58] This restriction prohibits elected officials from holding certain other public offices and public jobs simultaneously. Accordingly, upon taking office, an elected official voluntarily limits his opportunities to seek other public offices or jobs.

Additionally, when a public entity purchases or sells land to a private entity, the names and ownership interests of any elected officials connected with such private entity must be disclosed and published in the official records of the public entity.[59]

Moreover, elected officials relinquish their right to receive damages when criticized publicly, regardless of whether such criticism is based on the truth, as the standard for defamation of public officials is stricter than for average citizens. An elected official has the burden of proving "actual malice" to recover in an action for defamation.[60] Therefore, "defamation actions allow far greater latitude in the criticism of elected officials and politicians than private individuals."[61]

All of the foregoing limitations on elected officials' privacy are designed to protect the public, to ensure that the judgment and integrity of Louisiana's elected officials

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[58] *See* LSA-R.S. 42:61 et seq., *see* Appendix 5, pp. 219-227.

[59] LSA-R.S. 38:2213, *see* Appendix 5, pp. 217-218.

[60] *Trentecosta v. Beck*, 703 So.2d 552, 560 (La. 1997), citing *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967).

[61] *State v. Moses*, 665 So.2d 779, 785 (La.App. 4th Cir. 1995) citing U.S. Supreme Court jurisprudence.

are not compromised and to instill public confidence in Louisiana's elected officials. These are the same interests sought to be protected by Louisiana's drug testing program. In fact, elected officials relinquish important rights not surrendered by private citizens. Accordingly, the privacy interests of elected officials are diminished by their voluntary participation in an activity which is already subject to extensive regulation and in which other rights of such officials are given up for the greater good of the public. As stated by this Court in *National Treasury Employees Union v. Von Raab*,[62] "it is plain that certain forms of public employment may diminish privacy expectations even with respect to personal searches." Serving as an elected official is a form of public employment which carries with it a diminished expectation of privacy.

While elected officials are subject to public scrutiny, it is not feasible for Louisiana to conduct drug testing based on individualized suspicion as the State cannot monitor the day-to-day activities required to elicit such suspicion. Simply because elected officials are in the public eye, does not mean that the public, or more importantly the State of Louisiana itself, could detect potential drug use by those officials. Even elected officials lead private lives that are not subject to scrutiny by the public or the State. Suspicionless drug testing of elected officials is an important mechanism available to the State to ensure that its elected officials are of sound mind, body, judgment and integrity, free from the effects of illegal drugs, and to ensure that such officials will protect the State's fiscal well being, guard the health and safety of its

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[62] 489 U.S. 656, 672 (1989).

citizens, and enact and enforce drug laws and policies which will support the fight against illegal drug use. Accordingly, Louisiana's interests in conducting suspicionless drug testing of its elected officials are compelling and outweigh the diminished expectations of privacy held by such elected officials.

III. Louisiana's Drug Testing Program is Distinguishable from Georgia's Drug Testing Program which was at Issue in *Chandler v. Miller*.

The Appellate Court upheld the District Court's finding that the issues presented in this case are no different from the issues resolved by this Court in *Chandler v. Miller*[63] and therefore, struck down Louisiana's drug testing of elected officials as violative of the Fourth Amendment to the United States Constitution. However, the Appellate Court erred as there are vital distinctions between Louisiana's drug testing of its **elected officials**, at issue in the present case, and Georgia's drug testing of **candidates**, which was at issue in *Chandler*. Those distinctions make clear that Louisiana's drug testing scheme is **not** violative of the Fourth Amendment of the Constitution.

As the Appellate Court summarily adopted the District Court decision which relied on *Chandler* to invalidate Louisiana's new law, each of these distinctions will be discussed separately below:

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[63] 520 U.S. 305 (1997).

A. State governments have a demonstrable "special need" in curtailing illegal drug use by their *elected officials*, as opposed to *candidates* for election to public office.

Chandler is patently distinguishable as this Court there dealt with drug testing of **candidates** and the present case involves drug testing of **elected officials**. The District Court below found "no meaningful distinction between candidates for public office and those who have ascended to such office following an election." However, this distinction is of paramount importance and underscores why this Court's concerns in *Chandler* are clearly assuaged by the manner in which the Louisiana statute is constructed.

In *Chandler* this Court stated that the concerns expressed by Georgia, that is the "special needs" which prompted the State to implement drug testing of candidates, lacked any "concrete danger demanding departure from the Fourth Amendment's main rule."[64] While no concrete danger is posed by potential candidates to public office (most of whom will never actually serve in public office), the same cannot be said with respect to individuals holding elective office. As discussed previously, there is a real and concrete danger that the use of illegal drugs by elected officials in Louisiana **will** impair the judgment and integrity of those elected officials, **will** jeopardize the discharge of public functions, including the enactment and enforcement of state anti-drug laws and policies, and **will** undermine the public confidence

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[64] *Id.*

and trust in Louisiana's elected officials. An individual must actually hold public office before any of the dangers posed in *Chandler* become real and concrete. Louisiana's drug testing program involves elected officials who are actually holding public office. Louisiana's elected officials enact and enforce Louisiana's anti-drug laws while candidates for office do **not** enact or enforce any laws. In fact, Louisiana's elected officials are required to take an oath of office in which they swear to "support the constitution and laws of the United States and the constitution and laws of" Louisiana and that they "will faithfully and impartially discharge and perform all the duties incumbent" upon them as elected officials.[65] Candidates take no such oath nor do they have the corresponding responsibility to the State and its citizens. Louisiana's law is not designed merely to set a good example for the rest of the citizenry but to ensure that governmental decisions are made by officials with sound judgment and integrity. Consequently, the dangers present in the case at hand are real and **not** symbolic and Louisiana has a compelling interest in ensuring that such dangers are eliminated.

B. *Elected officials*, as opposed to candidates, have a significantly diminished expectation of privacy.

Elected officials have a diminished expectation of privacy that is not shared by candidates. As discussed previously, there are a host of laws which combine to reduce the expectation of privacy held by an elected

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[65] Louisiana Constitution Article X, Section 30, *see* Appendix 5, p. 55.

official. Elected officials voluntarily subject themselves to restrictions regarding: (1) with whom they can be privately and publicly employed, both while in office and upon terminating their public service; (2) with whom they can do business; and (3) with whom they can sell or purchase property or other goods. They also voluntarily submit to public disclosure with respect to their salaries, their handling of government funds, and certain private transactions and relinquish their right to sue for defamation when they are publicly criticized for their actions. Candidates, on the other hand, are not subject to these governmental controls and do not lose their status as private citizens. Accordingly, while candidates remain private individuals, elected officials become part of the government and are subject to extensive governmental regulations. Elected officials forgo their private status in order to serve the public and enjoy enhanced prestige and respect in the community by virtue of their public service.

C. While candidacy may be a "right" of every citizen, retention of elective office is a privilege.

Chandler is also distinguishable because participation in the democratic process, such as **seeking** elective office, i.e. being a candidate for office, is a **right** vested in every citizen of the United States, while maintaining elective office is a **privilege**.[66] An elected official does not have

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[66] *See* Case Comment, *Fourth Amendment – Mandatory Drug Testing – Eleventh Circuit Upholds Suspicionless Drug Testing for Political Candidates. – Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3086 (U.S. Oct. 1, 1996) (No. 96-126), 110 Harv. L. Rev. 547, 551-552 (1997).

the right to retain his position. The retention of an elective office is a privilege which may be maintained only if the official continues to exhibit the qualities of good moral character, sound judgment, integrity, and fitness for office. An elected official in Louisiana may be impeached for committing or being convicted of a felony or for malfeasance or gross misconduct while in public office.[67] Further, pursuant to the authority contained in Article X, Section 26 of the Louisiana Constitution, the Louisiana Legislature enacted laws providing for the recall of elected officials by the Louisiana electorate.[68] Therefore, Louisiana's drug testing of elected officials has a direct nexus to the important and legitimate governmental interests to be served by its drug testing program.

D. Unlike the Georgia statute, Louisiana's law provides an effective barrier to illegal drug use by elected officials.

Finally, it is noteworthy that the Louisiana drug testing program, unlike the Georgia program at issue in *Chandler*, is well designed to identify elected officials who abuse drugs. The Georgia statute required a candidate to submit to a drug test at any time within 30 days prior to qualifying for nomination or election. Therefore, the candidate had discretion as to when he would take the test and could abstain from drug use in order to avoid detection. The Louisiana program, on the other hand, provides an effective means of identifying elected officials who use

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[67] Louisiana Constitution Article X, Section 24, *see* Appendix 5, p. 54.

[68] LSA-R.S. 18:1300.1 et seq., *see* Appendix 5, pp. 55-68.

illegal drugs. Upon receipt of notice, an elected official is required to report to a designated collection site within 32 hours to provide a urine sample. Consequently, under the Louisiana program, an elected official would not have the opportunity to abstain from use of illegal drugs for a "pretest period sufficient to avoid detection."[69]

CONCLUSION

Louisiana's elected officials are significantly different from those who merely seek election to public office; unlike candidates, elected officials have a demonstrably diminished expectation of privacy, given their voluntary participation in a privileged activity which is pervasively regulated by the state and carries with it enhanced community prestige.

This diminished expectation of privacy highlights and indeed underscores Louisiana's compelling governmental interests and thus "special needs" in thwarting the elicit use of judgment impairing illegal drugs by its elected officials.

Chandler is manifestly distinguishable from the present case. This Court in *Chandler*, dealing with the rights of candidates, correctly concluded that private citizens who seek election to public office should not be subjected to suspicionless searches absent demonstrable "special needs." Louisiana's challenged statute is inapplicable to candidates and is only applicable to those who have

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[69] *Chandler v. Miller*, 520 U.S. 305 (1997).

successfully sought election to public office and have thus been entrusted with the management of government and with governmental decision making authority. The use of judgment impairing illegal drugs by Louisiana's elected officials poses a real and concrete danger demanding departure from the Fourth Amendment's general rule; and, unlike the Georgia statute, the Louisiana statute was carefully crafted to ensure that the random drug testing would create a real and substantial barrier to the continued use of illegal drugs and would provide a demonstrable impediment and deterrent to such untoward actions.

In the final analysis, and in a broader sense, is it truly "unreasonable" to expect those who have successfully sought out the privilege of governmental authority, to validate, by random testing, that their judgment and conduct is not impaired by the use of illegal drugs? Surely, elected officials have no greater expectation of privacy than students attending public schools who participate in extracurricular activities or certain categories of border guards and railway workers. Balancing these diminished expectations of privacy against the minimal inconvenience to which Louisiana elected officials are subjected by reason of the challenged statute demonstrates the reasonableness of Louisiana's mandated suspicionless searches.

It is respectfully submitted that this Court should review the opinion of the Court of Appeals for the Fifth Circuit which affirmed the District Court's finding that

Louisiana's drug testing program violates the Fourth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31415

PHILLIP E. O'NEILL, ETC, ET AL,

Plaintiffs,

AVERY C. ALEXANDER, in his official capacity of Louisiana State Representative for Representative District No. 93, State of Louisiana,

Plaintiff-Appellee,

versus

STATE OF LOUISIANA, ET AL,

Defendants,

MIKE J. FOSTER, JR., Honorable, in his official capacity as the governor of Louisiana and individually; LOUISIANA STATE BOARD OF ETHICS, and its members thereof; ROBERT ROLAND, Honorable, in his official capacity as the Chairman thereof; HARRY BLUMENTHAL, JR., Honorable, in his official capacity as the Vice-Chairman thereof; ROBERT BAREIKIS, Dr., in his official capacity as a board member thereof and individually; E. L. GUIDRY, in his official capacity as a board

member thereof and individually; VIRGIL ORR, Dr., in his official capacity as a board member thereof and individually; REVIUS ORTIQUE, JR., in his official capacity as a board member thereof and individually; T. O. PERRY, JR., in his official capacity as a board member thereof and individually; ROBERT L. SAWYER, in his official capacity as a board member thereof and individually; NATHAN J. THORNTON, in his official capacity as a board member thereof and individually; EDWIN O. WARE, III, in his official capacity as a board member thereof and individually; CAROLE COTTON WINN, in her official capacity as a board member thereof and individually; DAVID W. HOOD, Honorable, in his official capacity as Secretary of Louisiana Department of Health and Hospitals and individually; MARK C. DRENNEN, Honorable, in his official capacity as Commissioner of Administration and individually,

Defendants-Appellants.

ARTHUR A. MORRELL,

Plaintiff-Appellee,

versus

MIKE J. FOSTER, JR., Governor,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

December 28, 1999

Before WIENER and STEWART, Circuit Judges, and SHAW, District Judge.[1]

PER CURIAM:

This is an appeal from the decision of the district court holding that Louisiana Revised Statute 42:1116.1, which provides for random drug testing of elected officials holding state office in Louisiana, is violative of the Fourth Amendment of the United States Constitution. We have reviewed the record on appeal and the appellate briefs of counsel, and have heard arguments of able counsel discussing the relevant facts from the record and the applicable law as related in briefs and those arguments. In the end we are satisfied that the district court committed no reversible error in applying the pertinent law to the virtually uncontested facts and that all rulings of the district court should be affirmed for essentially the reasons set forth in the complete and well-crafted opinion of that court.[2]

AFFIRMED.

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] *See O'Neill, et al v State of Louisiana, et al*, 61 F.Supp. 2d 485 (E.D.La. 1998).

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PHILLIP E. O'NEILL, ET AL	CIVIL ACTION
VERSUS	NO. 98-2807 & 98-2870
STATE OF LOUISIANA, ET AL	REF: ALL CASES
	SECTION: L

JUDGMENT

(Filed Nov. 30, 1998)

Considering the Court's Order and Reasons, entered herein on November 25, 1998, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Avery C. Alexander, in his official capacity of Louisiana State Representative for Representative District No. 93, State of Louisiana, and Arthur A. Morrell, and against defendants, Honorable M.J. "Mike" Foster, in his official capacity as the Governor of Louisiana and individually, the Louisiana State Board of Ethics, and its members thereof: Honorable Robert Roland, in his official capacity as the chairman thereof, Honorable Harry Blumenthal, Jr., in his official capacity as the Vice-Chairman thereof, Dr. Robert Bareikis, in his official capacity as a board member thereof, E. L. Guidry, in his official capacity as a board member thereof, Dr. Virgil Orr, in his official capacity as a board member thereof, Revius Ortique, Jr., in his official capacity as a board member thereof, T. O. Perry, Jr., in his official capacity as a board member thereof, Robert L.

Sawyer, in his official capacity as a board member thereof, Nathan J. Thornton, Jr., in his official capacity as a board member thereof, Edwin O. Ware, III, in his official capacity as a board member thereof, Carole Cottin Winn, in her official capacity as a board member thereof, Honorable David W. Hood, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals and individually, Honorable Mark C. Drennen, in his official capacity as Commissioner of Administration and individually, permanently enjoining said defendants from implementing or enforcing Title 42, Section 1116.1 of the Louisiana Revised Statutes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of Phillip E. O'Neill, as the duly elected Justice of the Peace for the Second Justice of Peace District, Parish of Jefferson, State of Louisiana, is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, the State of Louisiana, and against plaintiff, Avery C. Alexander, in his official capacity of Louisiana State Representative for Representative District No. 93, State of Louisiana, dismissing said plaintiff's complaint with prejudice.

Each party is to bear its own costs.

New Orleans, Louisiana, this 30th day of November, 1998.

/s/ Eldon E. Fallon
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PHILLIP E. O'NEILL, ET AL.	*	CIVIL ACTION
	*	NO. 98-2807
VERSUS	*	(REF: ALL CASES)
STATE OF LOUISIANA, ET AL.	*	SECTION "L" (5)
	*	

ORDER AND REASONS

Before the Court are three motions: 1) motion of plaintiffs Phillip E. O'Neill ("O'Neill") and Avery C. Alexander ("Alexander") for preliminary injunction; 2) motion of plaintiff Arthur A. Morrell ("Morrell") for preliminary injunction; and 3) motion of defendants State of Louisiana and governor M. J. "Mike" Foster to dismiss plaintiffs' complaints for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Both plaintiffs' motions request that the Court enjoin implementation of the State of Louisiana's mandatory drug testing of elected officials pursuant to title 42, section 1116.1 of the Louisiana Revised Statutes. The parties have stipulated to an advancement of trial on the merits to be consolidated with the hearing of the preliminary injunction motions.

For the following reasons, the motion of the defendants to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is hereby GRANTED IN PART and DENIED IN PART, and both plaintiffs' motions for a

preliminary injunction are hereby GRANTED, and implementation of section 1116.1 is hereby PERMANENTLY ENJOINED.

BACKGROUND

Acts 1997, No. 1303, § 1 of the Louisiana Legislature enacted title 42, section 1116.1 of the Louisiana Revised Statutes during the 1997 legislative session. Sections 2 and 3 of Acts 1997, No. 1303 provided that the State Board of Ethics ("the Board") would implement random drug testing of elected officials on January 1, 1998 or whenever funds were allocated for the design and implementation of such a program. Those funds have been allocated and a proposed screening plan is now in place, making this controversy ripe for review.

Section 1116.1 declares that "the state has a compelling interest in establishing a requirement that all elected officials demonstrate that they do not use illegal drugs, without the necessity of showing any measure of individualized suspicion." La. Rev. Stat. Ann. § 42:1116.1(A) (West Supp. 1998). The statute calls for the development and implementation of a scheme for conducting random drug testing of elected officials. *See id.* at § 1116.1(B). The program requires selected officials to submit to drug screening at a laboratory approved by the Board. *See id.* at § 1116.1(C). The Board treats test results as confidential communications available strictly for use "in a proceeding, hearing, or civil litigation for a violation of this Section." § 1116.1(D)(1).

Initial positive test results are released only to the elected official and an individual designated by the Board

to receive such information, but the Board itself may obtain results should a second, confirmatory test also suggest the presence of illegal drugs. *See id.* at § 1116.1(D)(2). Finally, the statute forbids any elected official from either testing positive for drugs or refusing to submit to a drug screen when requested to do so. Violation of this provision results in imposition of penalties under title 42, section 1153(A) of the Louisiana Revised Statutes, but only if the official tests positive for drugs on two separate occasions or refuses to submit to screening. The regime counts a positive initial test and a confirmatory test as one occasion. *See* La. Rev. Stat. Ann. § 42:1116.1(E) (West Supp. 1998). Penalties for violations include censure of the official or a fine of not more than ten thousand dollars, or both. *See* La. Rev. Stat. Ann. § 42:1153(A) (West Supp. 1998).

Plaintiff O'Neill is the elected Justice of the Peace for the Second Justice of the Peace District, Jefferson Parish, Louisiana. On September 23, 1998 O'Neill filed his complaint for declaratory and injunctive relief, challenging the constitutionality of section 1116.1. His complaint requests class action certification, an injunction against implementation of drug testing, a declaration that the statute violates the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States as well as 42 U.S.C. § 1983, a declaration that the statute violates the Constitution of the State of Louisiana, and costs and attorneys' fees pursuant to 42 U.S.C. § 1988. O'Neill named as defendants the State of Louisiana, Governor M. J. "Mike" Foster, the Louisiana State Board of Ethics, and each individual member of the Board. On September 25, 1998 O'Neill amended his complaint to

add Avery C. Alexander as a plaintiff. Alexander is the elected State Representative for Representative District 93, Orleans Parish, Louisiana.

The other plaintiff in this case is Arthur A. Morrell. He, like Alexander, is an elected representative to the state legislature from Orleans Parish, Louisiana. Morrell filed suit on October 1, 1998, naming Governor Foster as the sole defendant. Morrell's complaint asks this Court to declare that section 1116.1 violates the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States as well as the Constitution of the State of Louisiana, to enjoin enforcement of the statute, and to award costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

On October 8, 1998 O'Neill and Alexander filed their application for preliminary injunctive relief and for advancement of trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. They argue that the recent decision of the United States Supreme Court in *Chandler v. Miller*, 117 S. Ct. 1295 (1997), which declared unconstitutional a Georgia statute requiring candidates for elective office to submit to drug testing as a precondition to running for office, controls the outcome of this case. According to the plaintiffs, the only difference between Louisiana's statute and the one at issue in *Chandler* is that section 1116.1 mandates testing of officials who are already in elected office, while the Georgia statute made testing a precondition of running for elected office. The plaintiffs maintain that this distinction is meaningless for purposes of constitutional analysis. Morrell's request for a preliminary injunction, filed October 13, 1998, advances essentially the same arguments.

In the Board's opposition, the defendants assert that section 1116.1 is constitutional since the drug testing scheme it embodies is distinguishable from the program in *Chandler.* The Board acknowledges that the random urinalysis does constitute a Fourth Amendment search, so that the issue for the Court is the reasonableness of the proposed search. The Board asserts that a finding of reasonableness normally requires a showing of some individualized suspicion unless the government can demonstrate special needs beyond those of normal law enforcement. If such special needs exist, a court must balance public and private interests to determine whether the search is permissible. The Board argues that the language of the statute itself establishes the special needs for drug testing, since citizens entrust their fiscal interests to elected officials, and since these officials are charged with enacting and enforcing drug laws.

According to the Board, the balancing of interests tips in favor of drug testing. To support this assertion, the Board contends that the testing program aims to deter drug use rather than punish it, that the state has a compelling interest in the health of its elected officials, that holding elected office is a privilege as opposed to the right to run for elected office, that elected officials cede many of the rights of private citizenship and therefore possess a diminished expectation of privacy, and that testing based on individualized suspicion is not feasible in this situation.

The Board then seeks to distinguish the Georgia program struck down in *Chandler,* relying primarily on the distinction between an elected official and a candidate for elective office. The Board argues that drug use by an

elected official presents a concrete danger to the public, while such use by a candidate is one step removed from such risks since the individual is not yet in office. Elected officials also take an oath to uphold and enforce the laws, while candidates have taken no such oath. Elected officials possess a lesser privacy expectation than candidates, since they are subject to more rigorous disclosure requirements concerning their private affairs. Moreover, there exists a right to run for office, but no corresponding right to retain that office once elected. Remaining in office is a privilege, not a right. Finally, the Board attests that the Louisiana scheme is more effective at deterring and discovering drug use than the Georgia program. The Board insists that the situation here is distinguishable from *Chandler*, so that section 1116.1 passes constitutional muster.

The State's motion and brief stress arguments similar to those advanced by the Board. In pressing to uphold the statute, the State contends that special needs exist that justify the use of random drug testing. The balancing of public and private interests weighs in favor of section 1116.1 since, like the student athletes in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), in which the Supreme Court upheld suspicionless drug testing, the elected officials here seek out the employment relationship with the State, thereby subjecting themselves to heavy regulation and a diminished expectation of privacy. Like the Board, the State emphasizes that the difference between candidates and elected officials, the increased use of drug testing in private industry, and the effectiveness of the proposed testing scheme all militate towards a finding that the public interests outweigh the

private ones, making section 1116.1 reasonable under the Fourth Amendment. The State also makes some policy arguments for upholding the statute, suggesting that the very novelty of the Georgia law in *Chandler* caused the Supreme Court not to treat it and the state's interests with the serious consideration they deserved. Moreover, if legislators pass laws requiring the testing of other public employees, why should elected officials themselves be exempt from such testing? In short, the State insists that section 1116.1 is much more than a symbolic gesture aimed at discouraging drug use.

The State's motion to dismiss also argues that: 1) this Court lacks jurisdiction over the State of Louisiana since the Eleventh Amendment bars suits against unconsenting states in federal court; 2) the plaintiff O'Neill lacks standing to bring this suit, since he is a judicial official and is therefore exempt from the testing requirements of section 1116.1; and 3) the Court lacks jurisdiction as to the plaintiffs' request for a declaration that section 1116.1 violates the Constitution of the State of Louisiana.

Plaintiff Morrell responds to the defendants by insisting that the Supreme Court rejected nearly identical arguments in *Chandler*. He contends that the attempted distinction between candidates and elected officials is meaningless and was implicitly rejected by the *Chandler* Court, so that the privacy expectations of elected officials are not so diminished as to permit suspicionless drug testing. Morrell attests that the effort to distinguish elected officials from candidates is irrelevant since the defendants have failed to demonstrate any special needs for drug testing in the first place. He points out that, in

other drug testing decisions, the Supreme Court recognized a diminished expectation of privacy in cases where a particular industry was heavily regulated *to ensure safety*. In other words, heavy regulation alone is not sufficient to establish a reduced level of privacy sufficient to sustain random drug testing. In the present case, Morrell contends that the *Chandler* Court specifically held that elected officials do not perform the sort of safety sensitive tasks that would support a special need for section 1116.1.

The response of O'Neill and Alexander concentrates primarily on the State's position that O'Neill lacks standing. O'Neill concedes that the statute does not apply to him in his capacity as a member of the Louisiana judiciary. O'Neill retains standing, he argues, because of his express intention to seek other elective offices in the future, thereby subjecting him to the testing regime of section 1116.1. Since the existence of the program chills his right to run for these offices, O'Neill insists that he has standing to maintain his suit.

On November 20, 1998 the parties agreed to a series of joint stipulations. The plaintiffs consented to withdrawing their request for class certification and to dismissing as defendants the members of the Board in their individual, but not official, capacities. In return, the defendants agreed that if this Court grants the injunction, they would view such an order as binding against all defendants and would refrain from testing any elected officials. All sides agreed to an advancement of trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, so that they will regard the motions as

ones for permanent rather than preliminary injunctive relief.

ANALYSIS

A. The State's Motion to Dismiss

As a threshold matter, the Court feels it is appropriate to address the State's Rule 12(b)(6) motion to dismiss before proceeding to review the merits of the plaintiffs' motions. When considering a motion to dismiss pursuant to Rule 12(b)(6), a court "must accept all material allegations of the complaint as true and construe them in the light most favorable to the nonmoving party." *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 593 (5th Cir. 1991). Dismissal is not appropriate unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hernandez v. Maxwell*, 905 F.2d 94, 96 (5th Cir. 1990). In making this determination, the Fifth Circuit has stated that it is inappropriate to go beyond the face of the pleadings. *See id.*

In this case, the State contends that it is not a proper defendant because it enjoys immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States. The Supreme Court has held that, under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). However, the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against state

officials whose enforcement of particular laws would violate the Fourteenth Amendment. *See id.* at 664 (discussing *Ex Parte Young*, 209 U.S. 123 (1908)).

The State in its brief asserts that it has not consented to suit in federal court. The language and history of the Eleventh Amendment clearly seem to preclude the plaintiffs' maintenance of a suit against the State in this Court. This defense is one obviously available from the face of the pleadings, and no set of facts construed in the plaintiffs' favor can surmount it. Accordingly, this Court will grant the motion to dismiss the State as a defendant.

The Eleventh Amendment defense is not available to state officials whose enforcement of section 1116.1 would violate the Fourteenth Amendment. The Fourteenth Amendment makes the Fourth Amendment applicable to the states, so that implementation of a statute that violates the latter necessarily violates the former. Since the central allegation in this case is that section 1116.1 is unconstitutional under the Fourth Amendment, the Governor and other individuals named in their official capacities are proper defendants. To the extent that the State's motion seeks dismissal of any of these other defendants, the Court will deny its motion.

The State's next argument for dismissal is that plaintiff O'Neill lacks standing, since he is a judicial official who is specifically exempted from the scope of the drug testing law. The inquiry into whether a particular plaintiff has standing to contest the constitutionality of a statute hinges on that plaintiff's ability to demonstrate an injury that is fairly traceable to the challenged conduct. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,

41-42 (1976). Absent such a showing, a federal court lacks jurisdiction to entertain the claim. *See id.* at 37-38.

In Louisiana, all judges "shall be governed exclusively by the provisions of the Code of Judicial Conduct, which shall be administered by the Judiciary Commission." La. Rev. Stat. Ann. § 42:1167 (West 1990). Louisiana courts have determined that justices of the peace "are judges within the contemplation of the law." *Morris v. State Farm Ins. Co.*, 649 So. 2d 58, 63 (La. Ct. App. 1994).

In his complaint, O'Neill describes himself as an elected justice of the peace. His conduct in office is therefore solely governed by the Code of Judicial Conduct, and the Board of Ethics, which will administer the drug tests, exercises no authority over him. O'Neill concedes this much in his response to the State's motion. Since section 1116.1 cannot apply to O'Neill, he is unable to demonstrate the requisite injury to satisfy constitutional standing requirements. He therefore lacks standing to sue, and the State's motion to dismiss will be granted as it pertains to O'Neill's claim. The Court notes, however, that the remaining plaintiffs are clearly subject to the Board's jurisdiction and possess standing to maintain their claims. To the extent that the State seeks to dismiss these plaintiffs' complaints, its motion will be denied.

The State's final basis for its motion to dismiss is that this Court lacks jurisdiction to adjudicate the question of whether section 1116.1 violates the Constitution of the State of Louisiana. Because this court finds that the statute's violation of the Constitution of the United States disposes of the case, it will not address this last argument and will deny this part of the motion as moot.

B. The Plaintiffs' Requests for Injunctive Relief

1. Standard of Review

Rule 65(a) provides for the issuance of preliminary injunctions, and also permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2). Courts view the preliminary injunction as an extraordinary remedy, available only after the movant "by a clear showing, carries a burden of persuasion." *Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir. 1990). That burden of persuasion requires the movant to show the existence of four separate factors: 1) irreparable injury; 2) substantial likelihood of success on the merits; 3) a favorable balance of hardships; and 4) no adverse effect on the public interest. *See id.* If the movant fails to sufficiently establish any one of these four criteria, the preliminary injunction will not issue. *See id.* Due to the consolidation of the trial on the merits with the hearing for the preliminary injunction in this case, the foregoing calculus defines the task the plaintiffs must accomplish in order to win permanent injunctive relief.

It is settled, and the parties agree, that a drug test is a search within the meaning of the Fourth Amendment. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-16 (1989). Since a finding that section 1116.1 violates the Fourth Amendment would constitute sufficient grounds for granting the plaintiffs' motions and

enjoining the statute's enforcement, the Court will confine its inquiry to evaluating whether the Louisiana testing scheme survives Fourth Amendment scrutiny.

2. Legacy of the Fourth Amendment

The actual intentions of the Framers in drafting the Fourth Amendment have provoked extensive debate throughout our history. While the Framers' precise thoughts may elude us, some scholars reviewing the history at the time of the Amendment's enactment believe that there is support for the notion that the drafters did contemplate the existence of both warrantless and non-warrantless searches.

The Fourth Amendment has distinct historical origins and the protections it affords can be traced to events occurring immediately prior to, and during, the American Revolution. *See* Jacob W. Landynski, Search and Seizure and the Supreme Court 19 (1966). The Fourth Amendment's drafters were aware of the famous *Wilkes* cases taking place in England during the 1760s. *See Boyd v. United States*, 116 U.S. 616, 625-27 (1886); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925, 933-34 (1997). The cases reversed common law in holding that unauthorized intrusions on private property by officials were trespass actionable against the intruding party and the issuer of the warrant. *See Boyd*, 116 U.S. at 626; Maclin at 933-34.

Colonial citizens also protested the Excise Act of 1754, which allowed tax collectors to interrogate citizens regarding annual alcohol consumption. *See* Maclin at 943.

Colonists feared that private residence searches would be the result of such broad governmental authority, and the public outcry against the issuance of these general warrants eventually led to legislation requiring specific warrants and the Warrant Clause of the Fourth Amendment. *See United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Boyd*, 116 U.S. at 624-29; Maclin at 943-44.

Though warrantless searches and the issuance of general warrants were strongly disfavored, there is evidence that such searches were not considered absolutely prohibited at the time the Fourth Amendment was drafted. *See* Maclin at 946. The Amendment was proposed by the First Congress which also enacted the Collection Act of 1789. *See id.* at 935. The collection Act authorized American officers to search ships without warrants, request that a judge retroactively find probable cause for a search or seizure, and otherwise immunize officers from tort lawsuits. *See id.*

In contrast to this assessment, the Fourth Amendment's jurisprudential history is rich with emphasis on the requirement of a warrant before a search could occur. The Supreme Court has required warrants for searches and seizures conducted under governmental authority, with few exceptions. *See Schmerber v. California*, 384 U.S. 757, 770 (1966) (both probable cause and a search warrant "are ordinarily required" for searches of dwellings and intrusions upon the body); *see also Stoner v. California*, 376 U.S. 483 (1964). In *Preston v. United States*, 376 U.S. 364 (1964), the Court held that police could search a person and his immediate surroundings incident to the legal arrest of that person. In *Warden v. Hayden*, 387 U.S. 294 (1967), the Court allowed police entries onto private

property when in hot pursuit of a suspect. These exceptions to the warrant requirement were grounded in concerns for officer safety and the potential destruction of evidence. *See id.* at 298-99; *Preston,* 376 U.S. at 367.

The Supreme Court employed a balancing analysis in *Camara v. Municipal Court,* 387 U.S. 523 (1967), to determine the reasonableness of nonconsensual housing inspections conducted without a warrant. The Court weighed the public need for housing code compliance inspections against the intrusions upon individual privacy interests. *See id.* at 534-36. The majority found the inspections reasonable under the Fourth Amendment, but also noted that there was no urgent need for immediate access to the homes. *See id.* at 538-540. The Court held that warrantless inspections were prohibited because the inspections were significant intrusions upon Fourth Amendment rights, and the public interest in housing code compliance would not be endangered by first requiring a warrant supported by probable cause. *See id.* at 534, 539.

In *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), the Supreme Court held that the Border Patrol's use of checkpoint stops to detect the flow of illegal Mexican aliens was consistent with the Fourth Amendment. The Court again employed a balancing of the public and private interests at stake. *See id.* at 556-57. Even though the stops were not based on any individualized suspicion, the Court concluded that the government's interest in controlling the influx of smugglers and illegal aliens outweighed the limited intrusion on individual citizen interests. *See id.* at 557-58. Given the heavy volume of border traffic and the very brief opportunity for detecting

aliens before they enter the country, the Court expressly declined to require reasonable suspicion as a basis for stopping cars; to do so would be impractical. *See id.* at 556-57.

The Court also emphasized that the stops were mere visual inspections and did not involve searches of the vehicles or their occupants. *See id.* at 558. The Fourth Amendment's objective of preventing arbitrary and oppressive invasions of personal privacy and security interests was not frustrated when governmental interests were compelling or urgent and the challenged procedure imposed only limited intrusions on the citizenry. *See Camara,* 387 U.S. at 539-40; *see also Martinez-Fuerte,* 428 U.S. at 554-57.

The Supreme Court held in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), that the search of a student's purse by a school official did not violate the Fourth Amendment. The majority explained that the school had a legitimate interest in maintaining order and a warrant requirement would be impractical when swift and effective discipline was necessary. *See id.* at 339-40. In his concurring opinion, Justice Blackmun wrote that in "exceptional circumstances," when the government has demonstrated the existence of "special needs, beyond the normal need for law enforcement," a court could resort to the balancing of government and individual citizen interests. *Id.* at 351.

3. Overview of Drug Testing

In recent years, when evaluating the constitutionality of suspicionless drug tests, the Court has continued to

require the existence of "special needs" *before* applying the balancing test. The Court's struggle to give some tangibility or concreteness to this concept is perhaps nowhere more evident than in cases involving Fourth Amendment challenges to drug testing laws. *See Chandler v. Miller,* 117 S. Ct. 1295 (1997); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989). These decisions have erected the guideposts this Court must follow.

The clash between drug testing and the Fourth Amendment is a recent phenomenon, with its genesis in the rise of drug abuse in this country during recent decades. The scourge of drug abuse naturally provoked attempts to control the problem. State and federal governments devised an array of weapons to combat what some had characterized as a threat to this country's security and prosperity. Programs including more aggressive law enforcement, interdiction, prevention, treatment, and education all emerged as tools in the arsenal. One of these approaches involved urinalysis of particular employees to ensure that they were not abusing drugs.

The Supreme Court has attempted to reconcile the need for such programs with the basic constitutional freedoms cherished by this nation. Review of a few key decisions is sufficient to canvass the terrain of the debate surrounding drug testing and privacy.

The Supreme Court's first significant treatment of the issue occurred in *Skinner v. Railway Labor Executives'*

Ass'n, 489 U.S. 602 (1989). In that case, the Court examined whether Federal Railroad Administration regulations mandating blood and urine tests of employees involved in accidents, and authorizing them for those who violated certain safety rules, passed constitutional muster. *See id.* at 606. After determining that the collection and analysis of urine samples implicated reasonable societal expectations of privacy and amounted to a search, *see id.* at 617-18, the majority emphasized that the Fourth Amendment only prohibited unreasonable searches and seizures, *see id.* at 619.

The hallmark of a reasonable search was one accomplished pursuant to a warrant based on probable cause and individualized suspicion, but the Court recognized that certain exceptions to this rule had evolved, particularly when the warrant and probable cause requirements were impracticable due to "special needs" beyond the normal need for law enforcement. *See id.* In cases where special needs justified a warrantless search, the inquiry hinged on the definition of reasonableness, which " 'is judged by balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests.' " *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). By conducting this balancing test, the Court sought to lend some tangibility to the concept of reasonableness and thereby to predict when a warrantless search would measure up to constitutional standards.

After recognizing that urine testing implicated reasonable expectations of privacy, the focus shifted to whether the government possessed a special need to conduct the screens. In *Skinner*, the Court held that, in certain

circumstances, where the intrusion was minimal and the important interest advanced by the government might be jeopardized by a requirement of individualized suspicion, a search might be reasonable even without individualized suspicion. *See id.* at 624. With these principles in mind, the Court reviewed the testing scheme and the privacy interests at stake in the case.

The Court determined that there existed a history of alcohol and drug abuse among railway employees, *id.* at 606-08, giving rise to a legitimate government interest in preventing accidents caused by employees' use of such substances, *id.* at 620-21. The Court found that these factors, coupled with the pervasive regulation that is characteristic of the railroad industry, *see id.* at 627, led to the conclusion that the government's compelling interest in safety and the individual's diminished expectation of privacy in the railroad context permitted urine testing, even without any showing of individualized suspicion, *see id.* at 633.

The Supreme Court confronted these issues again in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). In that case, an Oregon student and his parents challenged a local school district's policy of requiring student athletes to undergo random urinalysis for the detection of drugs as a condition of participation in school athletic programs. *See id.* at 651. The Court reiterated that such testing implicated the Fourth Amendment and applied the same test to assess the program's reasonableness. *See id.* at 652-53. In making the determination of whether a special need existed to suspend the normal individualized suspicion requirement in the context of a school

drug screening program, the Court debated many of the same arguments it considered in *Skinner.*

The majority concurred in the district court's assessment that drugs were a significant presence at the school in *Vernonia,* and that athletes' use of drugs and their status as role models for other students exacerbated this problem. *See id.* at 662-63. The Court located a safety issue in the concern for the welfare of children, who might be particularly susceptible to physical, emotional, and social damage from drug abuse. *See id.* at 661-62. Like the railway employees in *Skinner,* the students in *Vernonia* possessed a diminished expectation of privacy, due primarily to the in loco parentis role played by school officials. *See id.* at 655. Indeed, " 'students within the school environment have a lesser expectation of privacy than members of the population generally,' " and "[l]egitimate privacy expectations are even less with regard to student athletes." *Id.* at 657. In view of these factors, the majority concluded that the school district's policy was constitutional, but cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 664-65.

Skinner and *Vernonia* revealed some common considerations the Court found persuasive in deciding whether to uphold a particular drug testing scheme. In both cases, it seemed that the majority opinions identified a history of drug abuse, a fairly immediate safety concern, and a diminished expectation of privacy as justifications for bestowing the Court's constitutional blessing on the programs at issue.

One of these considerations was absent in a related case decided the same day as *Skinner.* In *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), the majority upheld a United States Customs Service drug testing plan that called for urine sampling of employees who applied for promotion to positions that involved interdiction of illegal drugs and required those hired to carry firearms or handle classified material. *See id.* at 679. The Court in *Von Raab* found that agents with a drug problem who occupied positions involving the use of weapons or handling of drugs posed a significant safety threat. *See id.* at 668-71. This meant that those employees enjoyed a diminished expectation of privacy, thereby justifying the use of drug tests. *See id.* at 672. Notably absent from the calculus in that case was any preexisting history of drug abuse on the part of the Customs agents. Indeed, the majority noted a statement by the Commissioner of Customs that, in his opinion, " 'Customs is largely drug-free.' " *Id.* at 660. Nevertheless, this agency was tasked with a unique mission since it served as the "first line of defense" against the smuggling of drugs into the United States. The Court in *Von Raab* concluded that the government had a compelling interest in assuring that employees placed in these positions would not include drug users.

Von Raab found that special needs existed and that the government interest was sufficiently compelling to justify suspicionless testing of the category of Customs employees at issue. *See id.* at 679.[1]

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[1] Some commentators have pointed to the absence of any history of drug abuse in *Von Raab* as creating a potential

In *Chandler v. Miller*, 117 S. Ct. 1295 (1997), candidates for elective office challenged a Georgia statute that required them to submit to and pass a drug test in order to qualify for state office. The Supreme Court found the law unconstitutional as violative of the Fourth Amendment. *See id.* at 1305. The Court reiterated its earlier position that collection and testing of urine samples by the government qualified as a Fourth Amendment search. *See id.* at 1300. Whether the searches at issue in *Chandler* were reasonable depended on the existence of some measure of individualized suspicion, unless the state could show some special needs, beyond the normal need for law enforcement, that justified a particularized exception to this rule. *See id.* at 1301. Determining whether such special needs existed forced the majority to "undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* In the context of drug testing, Justice Ginsburg noted the Court's precedents establishing that "the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 1303.

In applying this analysis to the statute in *Chandler*, Justice Ginsburg observed that the state's defense of the

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slippery slope which the Court later recognized, prompting it to endorse a more restrictive view of suspicionless searches in *Chandler v. Miller*. *See* George M. Dery III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 Ariz. L. Rev. 73, 91-94 (1998).

program relied heavily on the notion that holding high office and using drugs were incompatible. *See id.* Unlike the Court's previous drug cases, however, there did not exist "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* Indeed, the majority found nothing in the record before it suggesting that "the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." *Id.* While not dispositive, the Court also found it relevant that the state had not presented any evidence of a drug problem among candidates for elected office. *See id.* at 1303-04.

In summarizing its findings, the majority stated that "Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort." *Id.* at 1305. Essentially, of the three primary factors the Court had looked for in its earlier decisions – history of drug abuse, immediate safety concerns, and diminished expectation of privacy – only the last was arguably present in *Chandler.* The Court held that this was not enough, since the "need revealed, in short, is symbolic, not 'special.' " *Id.* In contrasting *Chandler* with its earlier rulings, the majority cautioned that "if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in *Skinner, Von Raab,* and *Vernonia* ranked as 'special' wasted many words in entirely unnecessary, perhaps even misleading, elaborations." *Id.* Justice Ginsburg made it clear that, "[h]owever

well-meant, the candidate drug test . . . diminishes personal privacy for a symbol's sake." *Id.* The Court concluded that the Georgia statute was unconstitutional, because where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless seach, no matter how conveniently arranged." *Id.*

The *Chandler* opinion exhibits an apparent retrenchment in the Court's drug testing jurisprudence. While continuing to recognize that suspicionless searches are occasionally justified, Justice Ginsburg stressed that in cases where the requisite showing of a special need is lacking, there is no need to balance public and private interests because the Fourth Amendment bars such searches. In other words, the inquiry as it has matured from *Skinner* to *Chandler* is a two step process. First, a court must determine whether special needs exist that justify a suspicionless search. If, and only if, such special needs are present, a court may then proceed to the second phase, balancing public versus private interests. In *Chandler,* the Supreme Court never reached the second step because it found no special needs. This view appears consistent with the one held by the drafters of the Amendment, who apparently envisioned the possibility of warrantless searches so long as they were accompanied by some level of suspicion or exigent circumstance (i.e., "special needs").

4. Constitutionality of the Louisiana Statute

Having reviewed the jurisprudence applicable to drug testing, this Court will now turn its attention to the statute challenged in this case. Section 1116.1 clearly

states its intention to authorize drug testing "without the necessity of showing any measure of individualized suspicion." This proclamation means that, in order to survive Fourth Amendment scrutiny, the statute must meet the special needs test enumerated by the Supreme Court.

The defendants place great emphasis on the distinction between elected officials and candidates in their attempt to distinguish this dispute from *Chandler.* The tone of the majority opinion in that case, however, indicates that the *Chandler* Court saw little difference between the two groups. The majority explicitly referred to elected officials rather than candidates when it found that the statute's target group performed no safety sensitive tasks establishing the requisite special needs. Moreover, it is clear from the *Chandler* opinion that the only reason Georgia was interested in testing candidates was due to the prospect that they might later become elected officials. Absent this possibility, there was absolutely no reason to pass such a statute in the first instance. Furthermore, if it is improper to drug test a candidate for elected office, it seems incongruous to hold that once an individual is actually in office that person is somehow more susceptible to the very same search.

Because this Court finds no meaningful distinction between candidates for public office and those who have ascended to such office following an election, the principles of *Chandler* squarely control the outcome of this case.

There is no question that the proposed tests under section 1116.1 constitute searches within the meaning of the Fourth Amendment. This ordinarily triggers a requirement that the government display some measure

of individualized suspicion in order to justify the search. Since the Louisiana statute clearly states its intention to conduct suspicionless searches, the burden falls on the defendants to demonstrate that there exist some "special needs," beyond the normal needs of law enforcement, that support a particularized exception to the main rule.

In the present case, the defendants acknowledge the absence of any history or pattern of drug abuse among elected officials. No evidence has been presented to suggest that such a problem exists. While the defendants assert, and it is true, that the lack of an existing pattern of abuse is not by itself sufficient to strike down a drug testing statute, other considerations in conjunction with this one are fatal to section 1116.1.

As for any immediate safety threat to the public, the defendants advance essentially the same generalized arguments rejected by the majority in *Chandler*. To paraphrase Justice Ginsburg, nothing in the record before this Court hints that the hazards the defendants broadly describe are real and not simply hypothetical to Louisiana's polity. Moreover, the *Chandler* Court specifically found that elected officials do not occupy safety sensitive positions within the meaning of its drug testing jurisprudence.

What is left, then, is the diminished expectation of privacy characteristic of all public officials. This factor is certainly persent, but it was also present in *Chandler* and failed to sway the majority. Notwithstanding the defendants' arguments to the contrary, then, the purpose of section 1116.1 is largely symbolic. Despite the laudable

intentions of the legislature in trying to present an example for the public, the Supreme Court has stated unequivocally that symbolism alone is insufficient to justify suspicionless searches in violation of the Fourth Amendment.

In summary, this Court concludes that the defendants have failed to carry their burden in demonstrating that "special needs" beyond the normal needs of law enforcement exist, such that an exception to the rule requiring individualized suspicion is warranted. For this reason, Louisiana's proposed scheme of random, suspicionless drug testing under section 1116.1 is an unconstitutional search in violation of the Fourth Amendment.

Having analyzed section 1116.1 under the Fourth Amendment, the Court must now factor its conclusion into the calculus for determining whether to grant the preliminary injunctions sought by the plaintiffs in this case. As stated at the outset of this Order, whether to grant a preliminary injunction depends on the movant showing the presence of each of four separate criteria: 1) irreparable injury; 2) substantial likelihood of success on the merits; 3) a favorable balance of hardships; and 4) no adverse effect on the public interest.

The Fourth Amendment discussion detailed above indicates that the plaintiffs satisfy the second requirement. Since a finding of unconstitutionality ensures that the plaintiffs would prevail on the merits, the Court need not address the other proffered grounds for striking down the statute. The Court finds that the plaintiffs fulfill the irreparable injury requirement since money damages would not be adequate to redress the constitutional

harms implementation of the drug testing program would cause. The balance of hardships also weighs in favor of granting the requested relief. The impermissible invasion of privacy occasioned by section 1116.1 is far graver than any inconvenience the defendants may experience as a result of an injunction against the statute's enforcement. Finally, while there is certainly an argument that the public has an interest in seeing Louisiana's drug testing scheme implemented, this general interest falls short of the plaintiffs' countervailing one in preserving the basic protections afforded by the Fourth Amendment. Since no "special needs" beyond the normal needs of law enforcement exist to justify suspicionless searches in this situation, the public's interest in preventing drug abuse among elected officials, while not insignificant, cannot supersede one of the Constitution's most fundamental proscriptions.

The plaintiffs have demonstrated that they meet each of the four requirements for the issuance of a preliminary injunction. In light of the parties' stipulations in this matter, the Court will grant the plaintiffs' motions and permanently enjoin enforcement of section 1116.1.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the motion of defendants State of Louisiana and Governor M. J. "Mike" Foster to dismiss the plaintiffs' motions pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is hereby GRANTED IN PART, such that the State of Louisiana is dismissed as a defendant due to its Eleventh Amendment immunity and the complaint of plaintiff

Phillip E. O'Neill is dismissed for lack of standing, and DENIED IN PART, as it relates to all other parties and claims. The motion of plaintiff Avery C. Alexander and the motion of plaintiff Arthur A. Morrell for preliminary injunction against the enforcement of title 42, section 1116.1 of the Louisiana Revised Statutes are hereby GRANTED, and the defendants are hereby PERMANENTLY ENJOINED from implementing or enforcing the statute since it violates the Fourth Amendment to the Constitution of the United States.

New Orleans, Louisiana
This 24 day of November 1998.

/s/ Eldon E. Fallon
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

§1116.1. Random drug testing of elected officials

A. The legislature declares the interest of the state in ensuring that those who are elected to serve in public office at all levels of government are persons who have a respect for the laws they are to uphold and are persons of integrity, sound judgment, reliability, and seriousness of purpose. The legislature finds that the use of illegal drugs which may impair the physical or mental ability of an elected official to function effectively in all aspects of his duties cannot be tolerated, and therefore the state has a compelling interest in establishing a requirement that all elected officials demonstrate that they do not use illegal drugs, without the necessity of showing any measure of individualized suspicion.

B.(1) The board shall develop and administer a program of random drug testing for elected officials, which shall require elected officials on a random basis to submit to a drug test which shall screen for the presence of illegal drugs. For the purposes of this Section, "illegal drug" means marijuana, opioids, cocaine, amphetamines, or phencyclidine, except that a drug taken in accordance with a lawful prescription shall not be considered an illegal drug.

(2) The board shall develop a plan which shall include a methodology for identifying and selecting those elected officials required to be tested for the use of illegal drugs. The board shall not disclose the name or identify the elected official selected for testing by name to the laboratory. Such plan shall include a confirmatory test to confirm that the positive results of the initial test are

correct. The definitions and the drug testing procedures and standards as provided in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950 shall be applicable to the program developed by the board.

(3) The board shall develop the random drug testing program in a manner that will be effective in detecting and deterring illegal drug use by elected officials. The commissioner of administration and the secretary of the Department of Health and Hospitals shall, at the request of the board, provide assistance in the development, design, and implementation of the random drug testing program.

(4) The board shall adopt such rules and regulations as are necessary for the implementation of the random drug testing program in accordance with the Administrative Procedure Act.

C. The program developed by the board shall require the elected official to submit to a drug test at a laboratory approved by the board. The board shall maintain a list of such approved laboratories which meet the drug testing standards as set forth in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950. All costs of the program, including the cost of all drug tests, shall be paid by the board. The board shall pay the cost of any confirmatory test required by this Section.

D.(1) All information, interviews, reports, statements, memoranda, or test results received by the board through its drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public

or private proceedings, except in a proceeding, hearing, or civil litigation for a violation of this Section.

(2) The results of a positive initial test shall only be disclosed to the tested elected official and to the person designated by the board to receive such information, but may be disclosed to the board or an authorized employee or agent of the board should the confirmatory test also indicate the presence of illegal drugs.

(3) Except as otherwise provided in this Subsection, no person shall disclose the name of the person selected for testing, the administration of the test, or the test results of any person tested pursuant to this Section to any person other than the board or an authorized employee or agent of the board, or the tested elected official.

(4) Notwithstanding the provisions of R.S. 42:1141(E)(12), an elected official shall be furnished a copy of the results of any drug test he has submitted to under the provisions of this Section and such elected official shall not be prohibited from disclosing the results of such drug test to any person.

E. No elected official shall test positive for illegal drugs nor refuse to submit to a drug test when requested to do so by the board pursuant to the provisions of this Section. A violation of this Section shall subject the elected official to the penalties provided by this Chapter. However, the board shall not impose any penalty on an elected official for testing positive for illegal drugs unless he has tested positive for illegal drugs on two separate occasions. For the purposes of this Subsection, a positive

initial test and the confirmatory test of such positive initial test shall be considered one occasion.

Acts 1997, No. 1303, §1.

* * *

APPENDIX 4

Rules

RULE

Department of Civil Service
Board of Ethics

Drug Testing of Elected Officials
(LAC 52:I:101 and Chapter 17)

In accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Civil Service, Board of Ethics has promulgated rules for the random drug testing of elected officials as required by Section 1116.1 of the *Code of Governmental Ethics* (R.S. 42:1116.1).

No preamble to the rules has been prepared.

Title 52

ETHICS

Part I. Board of Ethics

Chapter 1. Definitions

§101. Definitions

* * *

Collection Agency – a person selected by the board, which has collection sites throughout the state of Louisiana.

* * *

Designated Representative – a board-appointed member of the staff of the Ethics Administration Program, whose primary responsibility includes overseeing the

implementation of the program to enforce the random drug testing of elected officials.

* * *

Person Authorized by an Elected Official – a person or persons selected by the elected official who may receive notice of selection for testing. If the elected official chooses to select such a person to receive notice, the name and address of such person shall be provided by the elected official to the designated representative.

* * *

Random Number – the number assigned to the elected official, which ensures the confidentiality of the testing process.

Random Number Selector – a person selected by the board, responsible for the selection of those elected officials subject to the random drug testing.

Random Process – a generally accepted method to ensure that the elected officials are chosen by their random numbers in an unsystematic manner.

* * *

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1134(A).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 23:1288 (October 1997), amended LR 24:1893 (October 1998).

Chapter 17. Random Drug Testing for Elected Officials

§1701. General

The board, pursuant to R.S. 42:1116.1, shall develop and administer a program to conduct random drug testing on elected officials by means of a urine specimen collected, stored and transported in a manner effective in detecting and deterring illegal drug use. The board shall adhere to the statutory definitions and guidelines in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950 to implement the provisions of the random drug testing for elected officials.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1893 (October 1998).

§1703. Designated Representative; Duties and Responsibilities

A. The designated representative acts as the liaison between the board and the collection agency and the certified laboratories, and such duties shall be carried out as directed in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950.

B. The designated representative shall provide the collection agency with a list of the names of the elected officials selected by the random number selector and the corresponding officials' random numbers.

C. The designated representative shall send a notice by commercial delivery to the elected official requiring

the elected official or a person authorized by the elected official personally sign the proof of receipt of the notice in order to notify the elected official that he has been randomly selected to submit to a drug test.

D. The designated representative shall obtain from the commercial delivery service a copy of the receipt containing the elected official's or authorized person's signature evidencing proof of delivery of the notice to the elected official. If the elected official or person authorized refuses or is unavailable personally to receive the notice, the commercial delivery service shall report the refusal or unavailability to the designated representative.

E. The designated representative shall ensure the confidentiality of all procedures associated with the testing of the elected official, including the selection, delivery of notice, subpoena, and testing results, unless otherwise expressly provided by law or by these rules.

F. Upon receipt of the results from the medical review officer, the designated representative shall provide the elected official with a certified copy of the results of the drug test.

G. Upon receipt of the medical review officer's analysis and confirmation of a positive result of the test, the designated representative shall submit the result of the test to the board for action pursuant to R.S. 42:1141(B)(3).

H. Upon request by the medical review officer, the designated representative shall obtain the medical records of the elected official whose test results are positive.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1893 (October 1998).

§1705. Random Selection of Elected Officials

Each elected official shall be assigned a number by the designated representative. This number is utilized in the random selection process to ensure that the selection process and test results are kept confidential.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1707. Selection Process; Random Number Selector

A. The designated representative shall supply the random number selector with the random numbers that have been assigned to the elected officials. The random number selector shall select by a random process a percentage of the random numbers, as determined by the board.

B. The random number selector shall not, at any time, have access to the corresponding names of the elected officials.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1709. Selection Process; Percentage

The board, at its meeting immediately subsequent to the promulgation of these rules and at its April meeting every calendar year thereafter, or the next subsequent meeting if no meeting is held in April, shall determine the percentage of elected officials to be chosen by a random process for drug testing in the subsequent fiscal year. The board may apply the following guidelines:

1. 10 percent of all elected officials the first year; and

2. 5 percent increase every year thereafter, with a maximum of 50 percent of all elected officials to be selected to submit to a drug test.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1710. Notice

A. Notice to the elected official shall be delivered to the elected official or person authorized by the elected official by a commercial delivery service requiring the elected official or person authorized by the elected official to sign for the notice and ordering the elected official

to report to a designated collection site within 32 hours from receipt of the notice. A copy of the signature provided by the commercial delivery service shall evidence proof of delivery to the elected official. If the elected official or person authorized by the elected official refuses or is unavailable to sign the necessary form, the commercial delivery service shall notify the designated representative of the refusal or the unavailability.

B. If the elected official or person authorized does not receive the notice, the designated representative shall issue a subpoena at the date and time to be selected solely by the designated representative ordering the elected official to report to a designated collection site within 32 hours of the service of the subpoena. Such subpoena shall be personally served on the elected official.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1711. Collection Agency; Duties and Responsibilities

A. The board shall select a collection agency that utilizes the National Institute on Drug Abuse (NIDA) guidelines proscribed in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950.

B. The random numbers and the corresponding names are submitted to the collection agency.

C. The collection agency shall maintain a record as to the date and time when the elected official reported to the collection site.

D. The collection agency shall provide the designated representative with the names of the elected officials who failed to report to the collection site within the time required.

E. The collection agency shall insure the transportation of the collected sample to a NIDA-certified or College of American Pathologists-Forensic Urine Drug Testing (CAP-FUDT)-certified laboratory to be analyzed according to Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950.

F. The collection agency shall provide a certified copy to the designated representative evidencing the chain of custody of each sample from collection of the sample to its receipt by the certified laboratory.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1713. Collection Agency; Confidentiality

The collection agency and its employees have a duty to conduct such collecting, storing and transporting of the sample in a confidential manner, respecting the privacy rights of the elected official. The contract between

the board and the collection agency shall prescribe penalties if the collection agency breaches the required confidentiality.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1715. NIDA-Certified and CAP-FUDT-Certified Laboratories

A. The board shall maintain a list of laboratories that are certified by either NIDA or CAP-FUDT as provided by the Department of Health and Hospitals and to which the sample is submitted for testing in accordance with the guidelines in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950.

B. Should the initial test of the sample of the elected official produce a negative result, the laboratory shall submit that result to the medical review officer who shall forward it to the designated representative for further processing and dissemination to the elected official.

C. Should the initial test of the sample of the elected official produce a positive result, the laboratory shall conduct a confirmatory test on the remainder of the split sample. The result elicited from the confirmatory test is submitted to the medical review officer for review.

D. The certified laboratory shall provide a certified copy to the designated representative evidencing the chain of custody of each sample from receipt of the

sample by the certified laboratory to its analyzation by the laboratory.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1894 (October 1998).

§1717. Second Separate Test

A. If the board determines, pursuant to LAC 52:I.1727, that the elected official violated La. R.S. 42:1116.1, the board shall issue a subpoena for the appearance of the elected official at a collection site not less than one month and not more than six months after such determination.

B. The provisions of LAC 52:I.Chapter 17 and NIDA guidelines as set forth in Chapter 14 of Title 49 of the Louisiana Revised Statutes of 1950 shall be utilized in collecting, storing, transporting and analyzing the second separate sample.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

§1719. Elected Officials; Duties and Rights

A. Upon receipt of notification, the elected official has a duty to report to the designated collection site within 32 hours to submit a sample for testing.

B. The elected official has a right to receive from the designated representative a copy of the results of the test and the confirmation by the medical review officer, if necessary.

C. The elected official must, at the request of the designated representative, authorize the release of his medical records to the designated representative for review by the medical review officer.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

§1721. Good Cause for Failure to Report to Collection Site

A. Definition. For purposes of §1721, the following definitions shall apply:

Good Cause – any reason, in the considered judgment of the board or the designated representative, beyond the control of the elected official that directly prevents the elected official from reporting to the collection site within 32 hours of receipt of the notice or subpoena.

B. If an elected official cannot report for good cause, the elected official shall promptly file a written petition

with the designated representative outlining the reasons establishing good cause for his unavailability. If the designated representative finds good cause, a subsequent subpoena shall be issued at a date and time to be determined solely by the designated representative directing the elected official to report to a collection site to submit a sample.

C. If the designated representative does not find good cause, an elected official may request that the board conduct a private hearing to determine if the elected official had good cause which prevented him from reporting to the collection site within 32 hours from receipt of the notice or subpoena.

D. If the board determines that the elected official had good cause which prevented him from reporting to the collection site within 32 hours from receipt of the notice or subpoena, the board shall require that the designated representative issue a subsequent subpoena at a date and time to be determined solely by the designated representative directing the elected official to report to a collection site to submit a sample.

E. Should the board determine that the elected official did not have good cause to prevent him from reporting to the collection site within 32 hours from receipt of the notice by either commercial delivery or subpoena, such failure to report to the collection site shall constitute a refusal to submit to a drug test as provided in R.S. 42:1116.1.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

§1723. Medical Review Officer; Duties and Responsibilities

A. The board shall appoint a medical review officer, who is responsible for reviewing the positive results attained by the certified laboratory, using generally accepted medical practices in reviewing the test results.

B. The medical review officer is supplied with only the random number to identify the sample results that he reviews.

C. The medical review officer provides a report to the designated representative containing his analysis and findings.

D. The medical review officer shall forward negative results to the designated representative for further processing and dissemination to the elected official.

E. The medical review officer may require the designated representative to obtain the medical records of the elected official who tested positive if the medical records could supply any possible medical reasons to explain the positive results.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

§1725. Test Result Records

A. Should the initial or confirmatory test elicit a negative result, or if the board determines that the elected official did not violate La. R.S. 42:1116.1, then the designated representative shall destroy the test results 3 years after the elected official is notified of the negative result from the laboratory or 3 years after the board's determination that La. R.S. 42:1116.1 was not violated.

B. Should the initial and confirmatory tests elicit positive results, the Board shall retain all such test results as evidence in the event the elected official should subsequently at any time test positive for illegal drugs on a second occasion.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

§1727. Violations

A. Should the initial and confirmatory tests elicit positive results, as well as confirmation of the positive test results by the medical review officer, the board may, and upon the request of the elected official shall, conduct a private hearing to determine if the elected official violated La. R.S. 42:1116.1.

B. Should the initial and confirmatory tests of the second separate test ordered by the board elicit positive results, as well as confirmation of the positive test results by the medical review officer, the board may, and upon

the request of the elected official shall, conduct a public hearing to determine if the elected official violated La. R.S. 42:1116.1 and to impose penalties.

C. If the elected official does not report to the collection site within 32 hours of receipt of the notice or service of a subpoena, or willfully evades service of a subpoena, the board may, and upon the request of the elected official shall, conduct a public hearing to determine if the elected official violated La. R.S. 42:1141B by refusing to submit to a drug test required pursuant to La. R.S. 42:1116.1 and if so what penalties to impose.

AUTHORITY NOTE: Promulgated in accordance with R.S. 42:1116.1 and R.S. 42:1141(B)(3).

HISTORICAL NOTE: Promulgated by the Department of Civil Service, Board of Ethics, LR 24:1895 (October 1998).

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